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In The
Supreme Court of the United States

No. 71-262

WILLIAM M. OKEEFFE, Deputy Commissioner, Sixth Compensation District, Department of Labor,

Petitioner,

versus

AEROJET-GENERAL SHIPYARDS, INC., and THE HOME INDEMNITY COMPANY,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

George Stelljes, Jr.
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Attorneys for Respondents

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The opinion and decision of the Court reversing the Circuit Court of Appeals was rendered summarily by simultaneously granting certiorari and reversing the lower court. Therefore, the Respondents did not have the opportunity to submit a brief upon the merits or orally argue the case before

the Court, nor did this Court have the benefit of such written or oral argument. Yet the opinion not only reverses the decision of the lower court in this case, but it overrules, without mentioning them, three other lower court decisions, and engenders upon the modification proceedings under the workmen's compensation act an astonishing and extreme rule - a deputy commissioner may modify an order at his whim.

The opinion of this Court states at page 2 that a deputy commissioner is vested "with broad discretion to correct mistakes of fact, whether demonstrated by (1) wholly new evidence, (2) cumulative evidence, or (3) merely further reflection on the evidence initially submitted." (Numerals added)

The existence of wholly new evidence is certainly a valid basis for modification, but (2) and (3) "cumulative evidence" and "merely further reflection" accord to the deputy commissioner absolute, unlimited authority to modify a prior order.

This language clearly overrules such decisions as *Texas Employers' Ins. Ass'n v. Sheppeard*, 42 F.Supp. 669, and *Stansfield v. Lykes Bros. S. S. Co.*, (5th CCA 1941) 124 F.2d 999, where Judge Hutcheson stated in the opinion:

> "While we think it plain therefore, that new evidence may be fairly introduced in a proceeding to re-open on the ground of a mistake in the determination of a fact, and that this new evidence need not be 'newly discovered', we think it equally plain that the statute means something more than that the commissioner may change his mind whenever he pleases, and either on the same evidence or on new evidence, without a showing that there was a mistake in a determination of fact, make a new award. The general right to make

> a new award which is allowed under the terms of some statutes is one thing, and the right to make a new award on the limited grounds set out in the Federal statutes is quite another. Under the Federal statutes, a reaward may not be made unless there is evidence reasonably supporting the finding, on which the new award must rest, of a change of conditions, or of a mistake in the determination of a fact by the commissioner."

Tudman v. American Ship Bldg. Co., (7th CCA 1948) 170 F.2d 842, is also overruled by the decision for it too held that the deputy may not simply reevaluate the evidence forming the basis for his previous finding and order.

The overruling of these decisions and their reasoning perhaps is not as important as the result the decision will cause.

The import of the decision of this Court is that no party to a workmen's compensation proceeding, neither the employee nor the employer and the carrier, will ever be able to consider any award as final, for tomorrow, upon "merely further reflection", an order may be overturned by modification. Surely it is imperative that some degree of finality attach to a deputy commissioner's decision, and certainly it is necessary that the deputy commissioner in making an initial determination be aware that his decision will be final, absent the special circumstances of a change in condition or a mistake in a determination of fact. We ask whether it is wise that a deputy commissioner be able to formulate his "final" award or order with the knowledge and thought that tomorrow, or next month, or six months later, he can contemplate upon his decision and by modification "upon further reflection" change his mind and the decision. We think not and submit that this is very undesirable.

This result of the decision of the Court is beyond the intent of the statute providing for modification and not within the contemplation of Congress in enacting the statute. We submit that the Court should grant a rehearing, reconsider its decision and opinion, and adhere to the principles enunciated in the cited decisions by denying the petition for certiorari.

Respectfully submitted,

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Attorneys for Respondents

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondents hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

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George Stelljes, Jr.

Attorney for Respondents

CERTIFICATE OF SERVICE

I DO CERTIFY that three (3) copies of the foregoing Petition for Rehearing have been furnished to the Solicitor General, U. S. Department of Justice, Washington, D. C. 20530, by United States Mail, this ..... day of January, 1972.

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Attorney